

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK (BROOKLYN)

3 SARRI ANNE SINGER, et al,

4 Plaintiffs,

5 v.

6 BANK OF PALESTINE,

7 Defendant.

Case No. 1:19-cv-00006-ENV-RML

Brooklyn, New York

December 1, 2022

2:04 p.m.

8
9 TRANSCRIPT OF TELEPHONIC HEARING
BEFORE THE HONORABLE ROBERT M. LEVY
10 UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Call to order at 2:04 p.m.)

2 THE COURT: Good afternoon, this is Judge Levy.

3 We're here on docket number 19-CV-6, Singer v. Bank of

4 Palestine.

5 Will counsel please state their appearances for the

6 record, starting with the Plaintiff?

7 MR. RADINE: Good afternoon, Your Honor, this is

8 Michael Radine of Osen, LLC for Plaintiffs. I am joined today

9 by my colleague Gary Osen.

10 MR. BERGER: Good afternoon, Your Honor, for Bank of

11 Palestine, this is Mitchell Berger, Squire Patton Boggs. And

12 I'm joined by my colleagues Kassan Dalul (phonetic) and Joseph

13 Alonzo.

14 THE COURT: Thank you. Is either side expecting

15 anyone else?

16 MR. RADINE: Not Plaintiffs.

17 MR. BERGER: Not for Bank of Palestine. And Your

18 Honor, I do note that we filed a status report under seal and I

19 heard there are eight participants in this call. So I just

20 hope that as for material that was filed confidentially, that

21 all speaking will take cognizance of that.

22 THE COURT: All right, is there anyone here who's not

23 related to either a party or a part of chambers? All right.

24 I believe that the additional numbers are members of

25 chambers.

1 MR. BERGER: Thank you, Your Honor.

2 THE COURT: All right, so how would you like to
3 handle that discussion of your November 28th letter?

4 MR. BERGER: Your Honor, if that question is directed
5 to me, Mitchel Berger, for Bank of Palestine, I mean, I would
6 say a couple of things that hopefully will frame the issue for
7 the Court, which is in addition to the tape issue that we
8 addressed in our November 28th, 2022 letter, I think it's worth
9 remembering that we have accomplished everything else that we
10 told the Court we would do by way of jurisdictional discovery,
11 both matters that the Court ordered and matters that we agreed.

12 And you can find a relatively recent list of those
13 accomplishments at Exhibit B to the letter we filed as ECF 100.

14 As to the tapes, in our view, we have successfully
15 implemented the plan that Your Honor directed in your August
16 22nd and October 17, 2022 orders.

17 In that, after review focused on Exabyte Tape 6 and
18 DDS Tape 23. We have not found any jurisdictionally relevant
19 records, which is to say records of SWIFT transfers through the
20 United States during the relevant period.

21 And just to go back briefly to first principals, we
22 have spent the last year and a half in discovery because Judge
23 Vitaliano directed jurisdictional discovery focused on whether
24 there were transfers through the United States for the subject
25 entities during the relevant period.

1 And that is why we have focused on that. And that is
2 why our response on the absence of such transfers is
3 jurisdictionally material.

4 So, from our standpoint, and I'm sure I should add
5 that yesterday, we had a three-hour third meet and confer
6 between the IT experts. So we now have done nine hours of IT
7 expert meet and confers.

8 So Plaintiff's expert and their counsel have an
9 opportunity to question both Mr. Sullivan and Mr. Regard with
10 respect to the declarations for the company in our letter.

11 In our view, looking at the last page of Judge
12 Vitaliano's order of April 30, 2021, we think it's time to
13 schedule a briefing schedule for our renewed motion to dismiss
14 for lack of jurisdiction.

15 I'm sure I'll have something to say in response to
16 what Plaintiff's counsel says, so I'll stop there, Your Honor.

17 THE COURT: All right, thank you.

18 Would Plaintiff's counsel wish to be heard?

19 MR. RADINE: Yes, Your Honor, thank you. So at our
20 last conference, Your Honor asked if the Court gave Sullivan
21 Strickler 30 days, would that put Plaintiffs in a position to
22 make their motion to compel if necessary?

23 Well, subject to our receiving certain responses to
24 outstanding queries that we've made to BOP, the answer to that
25 question is yes. We are certainly in that position to make

1 that motion to compel. And it is certainly necessary.

2 Unless Your Honor wants a preview of our motion now
3 and the deficiencies and the discovery process so far, we
4 propose that the Defendant be given until the end of the year
5 for Sullivan Strickler to complete whatever Bank of Palestine
6 wants them to complete in terms of the EDF tapes.

7 And BOP can use that time to provide us as to
8 responses to all outstanding technical questions we've asked
9 them over the last several weeks.

10 And we can meet and confer after the first of the
11 year and submit a proposed briefing schedule for that motion to
12 compel.

13 Again, if Your Honor wants me to elaborate on the
14 need for the motion, I'm happy to do so, but otherwise, we're
15 happy just to put a schedule in place and ultimately provide
16 the Court with a detailed submission early next year.

17 THE COURT: How does Defendant respond to that?

18 MR. BERGER: I'm sorry, Your Honor. Thank you.
19 Mitchell Berger for Bank of Palestine. Obviously, we don't
20 think there's any basis for a motion to compel, but I won't
21 rehearse our reasons.

22 You know, Your Honor, because of the way these status
23 conferences have gone, we wanted to make sure the Court had a
24 full picture, not only by way of letter, but by way of sworn
25 declarations as to what's happened.

1 So if Your Honor's going to let them file a motion to
2 compel, you know, we'd certainly understand that's within the
3 Court's discretion to do.

4 What that does is kick down the road yet again for
5 multiple months a renewed motion to dismiss for lack of
6 jurisdiction.

7 From our standpoint, the more efficient way to do
8 this would be to use a procedure, not unlike what Rule 56(d)
9 would have in a summary judgment context, which is let us renew
10 our motion to dismiss for lack of jurisdiction, because it's
11 not just the tapes. It's all the other matters that I've
12 mentioned that we produced over the last year and a half that
13 provide a basis for determining that there is no jurisdiction
14 here.

15 I don't know whether Your Honor just heard somebody
16 drop off. I just want to make sure that I still have the
17 Court.

18 THE COURT: The Court is still here.

19 MR. BERGER: Okay, thank you, Your Honor. And if
20 they want to in response to our renewed motion to dismiss for
21 lack of jurisdiction, identify using the equivalent of a Rule
22 56(d) procedure what else they really need in order to respond
23 to the jurisdictional issues that we believe are ripe for
24 decision and we think that would be more efficient.

25 If we do this seriatim, where they make a motion to

1 compel, we either oppose or oppose and cross move for
2 protective order, we're looking at candidly well into the end
3 of the first quarter of 2023 before that's resolved.

4 And then, who knows when we renew our motion to
5 dismiss? And we have been at this since the beginning of May
6 2021. So our interest is in resolving the jurisdictional
7 question as soon as possible.

8 We are dealing with, by Judge Vitaliano's order, a
9 very narrow question of were there transfers through the United
10 States for the subject entities during the relevant period?
11 And we think we've answered that question.

12 I suppose neither side wants to further argue their
13 potential motions on these issues, but that's my reaction to
14 their proposal, Your Honor.

15 THE COURT: Does Plaintiff have a response?

16 MR. RADINE: Sure. Well, first of all, Your Honor,
17 I'm a little surprised to hear concerns about moving this along
18 more quickly. I believe Defendant asked for four weeks for
19 Sullivan Strickler to do their work. And six months later,
20 they haven't been able to finish that yet.

21 But more to the point, the issue is not that if they
22 move to dismiss would we think there are other sources of
23 relevant documents that we want to move to compel on.

24 The issue is that they have yet to search the
25 databases on the tapes that we identified. They said they

1 weren't there. Sullivan Strickler proved that they were there,
2 but Sullivan Strickler doesn't have the capability to search
3 them properly.

4 So moving to dismiss now doesn't do anything. They
5 have to finish the process first of searching the tapes, which
6 is a process (inaudible) all along.

7 As we've said, because that appears to be outside of
8 Sullivan Strickler's capability, that task needs to go to an
9 independent qualified vendor who can do that kind of database
10 restoration work. Anything else is just a further waste of
11 everyone's time here.

12 MR. BERGER: So if I may respond to that, Your Honor?

13 THE COURT: Yes.

14 MR. BERGER: There's a bit of an inconsistency
15 between Chapter 1 of Mr. Radine's remarks at the beginning and
16 then Chapter 2, which is he says we still haven't finished, but
17 we only need four weeks.

18 The reality is they know from yesterday's very
19 lengthy meet and confer that Tape 6 is done and that all of the
20 analysis on Tape 23 is done with immaterial exceptions.

21 There was a question asked yesterday if you finish
22 the immaterial work, how long would it take? The answer is it
23 would take potentially up to four weeks doesn't change the
24 conclusions that have been given to you in the two
25 declarations.

1 And as for the attack on the qualifications of our
2 two experts, their qualifications are set forth in their
3 declarations.

4 But here's the bottom line, which is we are now
5 wheels within wheels, discovery on discovery, which is we are
6 only supposed to be searching for transactional records.

7 We have proven that these tapes do not contain the
8 relevant transactional records. Everything else is a waste of
9 time and money.

10 THE COURT: Well, as I understand it, Plaintiffs
11 appear to be offering to conduct their own search or an
12 examination and restoration of the tapes.

13 Is -- am I -- is that correct? Is that what
14 Plaintiffs are ultimately wishing to do?

15 MR. RADINE: Well, what we've proposed is sending the
16 tapes to an independent qualified vendor that both sides can
17 have access to, that both sides can work with, rather than the
18 process that Defendant has used so far, which has mostly
19 resulted in taking back prior sworn assertions about what was
20 on the tapes and then conducting searches that are not designed
21 to work.

22 So we want that process to start now, but if Sullivan
23 Strickler, BOP want them to finish the following four weeks,
24 then we'll move for it then.

25 MR. BERGER: Your Honor, I'm sorry, if I may be

1 heard?

2 THE COURT: Yes.

3 MR. BERGER: Respectfully, I believe we're talking
4 past each other a bit. The gratuitous shots at saying that
5 these two experts who have conducted this review are conducting
6 searches that, you know, either are designed to fail or fail,
7 it's -- I'm glad to hear Mr. Radine say we've given you two
8 sworn declarations, however, that are exactly to the contrary.

9 So if they want to try to prove that in a motion to
10 compel, I suppose the Court's going to let them do that, but
11 that's time consuming and expensive for us.

12 And what I can't tell about their proposal, their end
13 game, they want -- we can't let them look at undifferentiated
14 nonresponsive information in the tapes any more than we could
15 say we searched our paper files, why don't you all come in and
16 take a look for yourselves because that is contrary to how any
17 form of discovery and particularly electronic discovery is
18 done.

19 If what they want at the end of the day is to get an
20 independent expert to run yet another set of duplicative tests
21 at their expense, but without allowing them to see
22 undifferentiated nonresponsive information, which we cannot
23 give them.

24 We're in jurisdictional discovery after all. They
25 shouldn't be able to look at information that is designed to

1 establish jurisdiction until they've established jurisdiction
2 and they are not entitled to look at nonresponsive information.

3 But I guess all of this will be outlined in a motion
4 to compel if that's what they want to bring. And we can
5 respond to it. Our objection is we have done everything. We
6 have gone the extra distance.

7 Yes, it's taken a year and a half because we're the
8 ones who told them about the tapes. We're the ones who said we
9 would search the tapes. The tapes contain nothing responsive.
10 It's just going to prolong the process.

11 THE COURT: Well, it sounded, Mr. Berger, as though
12 you had a proposal that you would accept though if the search
13 were done by an independent vendor if nonresponsive information
14 was not shared with Plaintiffs.

15 And if Plaintiffs assume the cost of the search of
16 the independent vendor, it sounded as though you would be
17 willing to do that?

18 MR. BERGER: I don't have instructions from my client
19 to accept that, Your Honor. Obviously, if that's what Your
20 Honor's going to order, we don't think we should be bearing any
21 additional expense and we don't think that they should have
22 access to information.

23 They want to propose search terms. They want to talk
24 about methodology and the like, they're -- that doesn't give
25 them access to the bank's information.

1 And we have an opportunity to screen what it is
2 that's coming out, then I suppose there's a way of working out
3 a protocol. That protocol has never been worked out.

4 But certainly, if they want to bear the expense, then
5 at least we're one step down the line towards something, but it
6 is very, very time consuming and time matters.

7 THE COURT: Well, I think that's actually where we
8 were headed before. I think Plaintiffs had made a similar
9 motion previously.

10 Defendants had made clear that Sullivan and Strickler
11 was the horse they were betting on to be able to produce the
12 information that was necessary.

13 And so, therefore, time was given to Sullivan and
14 Strickler to complete its task. It's taken longer than was
15 anticipated by Defendant, but I'm not faulting Defendant for
16 the delay. It sounds that you wanted to be thorough.

17 So it seems to me that the logical next step in order
18 to close the book once and for all on jurisdictional discovery
19 would be to permit Plaintiff to do this if that's what in fact
20 Plaintiff is wishing to do.

21 So, Mr. Radine, is that what you'd like to do?

22 MR. RADINE: Yes, we'd like to make that -- well,
23 right. Would Your Honor want that in a form of a motion to
24 make I understand what the Court was -- because yes, that's
25 what we've been looking for.

1 We've been looking for this to go to an independent
2 qualified vendor. We're happy to talk further about the
3 defense issue.

4 We had initially, if the Court recalls, offered to
5 pay half of the freight for that. We have obviously gone
6 through quite a bit of expense in the last several months of
7 Defendant's processes that have not moved the ball forward at
8 all.

9 We still need to have this go to an independent
10 qualified vendor. So we, I think, may feel a little
11 differently about paying that half, but we can brief that
12 before the Court.

13 THE COURT: So that's the only part of the proposal
14 that Mr. Berger might accept or might have proposed. The only
15 part that you might disagree with is who pays the bill of the
16 independent vendor and how much?

17 MR. RADINE: Right, Your Honor, because we had -- we
18 have consistently throughout the process said that data should
19 go to BOP and in the first instance. And they can decide what
20 is responsive.

21 But we need to be able to have communication with the
22 vendor about what processes they're doing. And of course, that
23 it be a vendor that's capable of doing the specific database
24 work that's needed here. But again, we've always said that we
25 do not get unfettered access to their records under our

1 proposal.

2 MR. BERGER: If I may, Your Honor?

3 THE COURT: Yes.

4 MR. BERGER: Some of the devil of this is in the
5 details. And it's hardly credible that Plaintiffs could have
6 spent as much money on their watching what we're doing as we
7 have spent on two different experts.

8 And normally, the way I've understood the discovery
9 would work under the Sedona principals and otherwise is they
10 have to demonstrate some demonstrable material defect in what
11 we've done.

12 You've received sworn testimony that said not we
13 can't find it, because we don't know what we're doing. It's
14 that we found SWIFT records and they're not responsive.

15 So, to do it all over again, that should certainly be
16 at their expense when there is evidence before the Court that
17 the process has been completed. It has not generated
18 responsive documents.

19 So they want to a do-over, which is essentially what
20 they're asking. Because they say, okay, we've had nine hours
21 of insight into what your folks have been doing. You paid for
22 all of it.

23 We want a do-over because we don't trust you and we
24 don't think you're doing it the right way. There's no reason
25 why that should be at Bank of Palestine's expense when all they

1 want is a do-over.

2 And what the Court apparently wants and certainly
3 understand that is the certainty that this in fact has been
4 done right.

5 But if that independent second, third check on what
6 we have done, that's something that the Plaintiffs insist on,
7 they ought to pay for it.

8 THE COURT: Well, there may be some other way of
9 resolving this and I'm only thinking about it at this point,
10 but it may be that the -- well, first of all, do we have any
11 idea how much it would cost to conduct this independent review?

12 MR. RADINE: Well, Your Honor, this is Michael Radine
13 for Plaintiffs. We had sent out some proposals before. I will
14 say that some of that most basic work may have already been
15 done by Sullivan Strickler that is just extracting the files
16 from the tapes.

17 So that may affect the cost, but on the -- so I don't
18 know exact. It may be even as much as \$150,000. I don't know.
19 We can certainly re-ask the -- what that be included in a
20 brief. And in that brief, I'll just note that we'll also set
21 out the material defect assertions as well to make that clear.

22 But anyway, just to frame it, I might say 150-, but
23 that's with the caveat that perhaps Sullivan Strickler will
24 have saved some time on the more basic steps.

25 I'd also note that in this process, we need to have a

1 full say in who the vendor is.

2 We didn't ask for Sullivan Strickler. We didn't ask
3 for six months to be spent on a vendor who is I think very
4 capable at what they do, but doesn't do this kind of database
5 reconstruction. So we need to be participating in that process
6 of selecting a vendor and then working with the vendor once
7 they are engaged.

8 MR. BERGER: Your Honor, if the Court would permit me
9 to ask the Court to ask Mr. Radine a question. This would
10 certainly help me, which is what is it that they believe that
11 an independent vendor is going to find that Sullivan Strickler,
12 which has done more than decompress files, (inaudible) search
13 files, and IDS, which has also searched these files, what do
14 they believe an independent vendor's going to find that is
15 going to justify this additional time and expense?

16 THE COURT: Mr. Radine, would you like to answer
17 that?

18 MR. RADINE: Sure. What we've asked for consistently
19 and what we've explained is that these files have to be
20 reviewed in either their native format or a modern analytical
21 database software that emulates that native format.

22 And in fact, in their August I think 15th letter, BOP
23 said evidently agreeing with us that they would be reviewing
24 these records as Sullivan Strickler in a native format.

25 They have since taken that back because it turns out

1 that's not a capability that Sullivan Strickler has.

2 What Sullivan Strickler does is they decompress all
3 the files. And there are hundreds of thousands here. And they
4 dump them all together into a single undifferentiated
5 environment. And then, they run search terms on that
6 environment. The problem is -- and as they said in the and as
7 you saw in the declarations, thousands of hits.

8 Now the problem with that is that database data
9 becomes disassociated when you just dump it into a single
10 environment.

11 It has to be loaded into a database format so that
12 for instance the date of a transaction is with the account
13 number of transactions so on and so forth. That is what
14 a -- the type of vendor we're looking for would do.

15 MR. BERGER: Your Honor, Mitchell Berger. If I may
16 be heard? I mean, respectfully, that's not an answer to the
17 question, which is they want to fish is the answer.

18 We have -- it's not like we say, oh, we couldn't find
19 anything. We found SWIFT records. You know, that's what they
20 call empirical testing. We were looking for SWIFT records. We
21 found SWIFT records. They just weren't responsive.

22 So it would seem to me that Mr. Radine's answer has
23 to be that they believe, after all this additional effort and
24 expense they want to go through, that their independent vendor,
25 the independent vendor, will find some SWIFT transactions we

1 haven't found.

2 And there's no reason to believe that given what you
3 have in front of you, Your Honor, in two sworn declarations,
4 which is why understanding that the Court wishes to assure
5 itself that this has been done correctly.

6 But that is why if they really insist on we want a
7 fish again and see if we come up with anything more than you
8 came up with, that is not a cost that ought to be visited on
9 BOP.

10 THE COURT: Well, I think that Plaintiff is saying
11 that the methodology that was selected wasn't fine-tuned enough
12 to be able to capture the data that they're looking for and
13 that they have a strong belief that if an independent expert
14 were to conduct the proper search, that there would be hits.
15 (Indiscernible?)

16 MR. BERGER: I'm sorry, Your Honor, I spoke
17 prematurely. I didn't know if you were directing a question to
18 Mr. Radine or to me? This is Mitchell Berger.

19 THE COURT: I was directing it to Mr. Radine.

20 MR. RADINE: Well, yes, Your Honor. The methodology
21 doesn't work. But to answer both your question and Mr.
22 Berger's assertions, it appears that there are -- that there
23 would be transactions that have been missed, transactions that
24 they've produced already to us have not been found any backups
25 of those same database.

1 The suggestion there is that the searches aren't
2 working. As we talked about -- talked with our IT expert who
3 will -- can give us greater detail to provide the Court if
4 that's helpful, it appears that the search processes are
5 failing both on the decoding level and on the database
6 analytical level.

7 But yes, they're currently missing transactions that
8 appear to be the case already, given the databases that
9 Sullivan Strickler was able to locate on the tapes
10 notwithstanding BOP's prior assertions did the opposite.

11 So this is why this is worth having another vendor
12 take a look at this and the expense being something that does
13 not fall to the Plaintiffs.

14 THE COURT: Is there a way to do a micro search as a
15 test to see whether or not your theory is correct before a
16 tremendous undertaking is taken and a large amount of money is
17 spent? Is that possible?

18 MR. RADINE: Sure. Maybe. I would want to take that
19 back to my IT expert, but I don't think so. I think the larger
20 problem is that to search a database, the database has to be
21 restored. And that is the main I think job to be done.
22 Running the searches, I think, is less of an issue.

23 But already, BOP has said there's tens of thousands
24 of hits. And that's just on the files that they've been able
25 to search, much less the database ones that I think they've not

1 been able to search.

2 So I think the larger issue is getting those
3 databases restored, so data could be accurately searched more
4 than running sample searches.

5 So I think it's going to take that first big step of
6 loading the data into either a native format or a modern
7 analytical database software that can emulate that format.

8 MR. BERGER: So, Your Honor, trying to be responsive
9 to the Court's question and suggestion, may I make this
10 suggestion, which is understanding that what we're looking for
11 are SWIFT records, right?

12 That's the goal of determining whether they're
13 transfers to the United States. That was the question Judge
14 Vitaliano raised.

15 I think it is common consensus including at
16 yesterday's meet and confer that only Tape 6, put aside the
17 other tapes, only Tape 6 contains SWIFT records. And that's
18 because the DES tapes like Tape 23 are incomplete backups as
19 you know from the affidavits.

20 But whether they're complete or incomplete, they're
21 only backups of the core banking system into which SWIFT data
22 from the relevant period wasn't entered.

23 If what Mr. Radine and his colleagues would like to
24 do is put together a proposal focused on Tape 6, that after he
25 consults with his IT expert, suggests a way of testing.

1 Because all the Sedona principals suggest you sort of
2 take this layer by layer, so that there's some initial testing.
3 And give us what they think the protocol is for that. And we
4 can meet and confer on that.

5 And then, we can come back. And if we can't reach an
6 agreement on it, then they want to file their motion to compel,
7 fine.

8 But it seems to me at least if we're being asked to
9 understand what they want to do, we ought to narrow it to Tape
10 6, they ought to put a more formal proposal into writing.

11 I'm happy if they want to share it with the Court at
12 the same time, but if they want to share it with us first, then
13 we can meet and confer about that proposal.

14 Let's see if it's narrow enough and quick enough and
15 it doesn't require entirely reinventing the wheel. And then,
16 we can report back to the Court.

17 THE COURT: Mr. Radine?

18 MR. RADINE: A couple things to address here. First
19 is a pretty important, I think, misrepresentation here that has
20 to be corrected.

21 SWIFT messages are excellent evidence of a transfer
22 through the United States, but they're not (inaudible).
23 They're essentially the envelopes that a transfer goes in if
24 transfers were mailed.

25 But transfers from banks outside the United States

1 all have been reprocessed from New York. That's why we have
2 been doing discovery into the core banking system, which has so
3 far produced 500 transactions from BOP.

4 The attempt to set aside the core banking system that
5 we've been discussing this whole time as not being able to
6 SWIFT (inaudible) is not how this works.

7 All these transactions are responsive. Tape 23 and
8 the other tapes that we identified in our last joint letter to
9 the Court, which Sullivan Strickler also found contained
10 iterative backups of the core banking system contained
11 potentially responsive transactional information.

12 What we proposed doing is this. We can meet and
13 confer with BOP and see if we can't agree on a process here.
14 And if not, we will submit a briefing schedule to the Court for
15 our motion to compel after BOP's had the opportunity to answer
16 all outstanding questions we presented throughout the
17 (inaudible) software.

18 THE COURT: Mr. Radine, would the idea of picking a
19 sample work in any way? In other words, if you just took Tape
20 6, not as the only case that you would be necessarily entitled
21 to look at in the long run if you prevailed, but as a test as
22 to whether or not there's more on those in that database than
23 what was disclosed, would that be a way of approaching this?

24 MR. RADINE: Yeah, that could work, Your Honor.
25 Again, reserving very much that Tape 6 and Tape 23 are very

1 different.

2 And we have -- we don't think either one was properly
3 searched. And they both have potentially different kinds of
4 responsive transactions, then yes, we could start with Tape 6
5 and have a qualified independent vendor examine that.

6 THE COURT: And if nothing was found on that that was
7 responsive to your needs, Mr. Berger would then say I'm sure
8 that would show that the motion to compel would not be
9 realistic with respect to other databases and that that should
10 end the inquiry at least as to what BOP would have to pay for
11 or contribute to. Would that part of an arrangement that you
12 could accept?

13 MR. RADINE: In terms of payment, that's something I
14 think that could work. Obviously, we still want Tape 23 of the
15 other backup tapes properly examined, but I think that's
16 something we'd be happy to talk about with BOP and essentially
17 the Court as a proposal.

18 THE COURT: Right, with the idea that if there were
19 other -- if you wanted to examine Tape 23 on your own dime, you
20 could do that.

21 But as far as what would be jointly paid for, you
22 would work out some kind of arrangement with -- for Tape 6.
23 And if that came up with some evidence that was useful to you,
24 then you'd be allowed to continue.

25 MR. RADINE: Yes, I think we understand the Court's

1 suggestion.

2 THE COURT: Okay. All right, is there anything else
3 we need to discuss?

4 MR. BERGER: Only this, Your Honor, just as a point
5 of information. And I -- this is why we certainly commend
6 focusing on Tape 6, which is when you go back as I know the
7 Court already has at the front of its mind to what we filed as
8 Document 100 and Exhibit B, part of the reason why Tape 23 and
9 the rest of these EDF tapes are necessary is we've already
10 produced transactions for the core banking system.

11 So again, Mr. Radine would have to be in a position
12 to say that over and above the transactions we have produced,
13 that somehow these stencil backup tapes of the core banking
14 system would contain something new.

15 So we certainly want to focus on Tape 6. And we
16 certainly want to see if the IT experts can come up with a
17 testing protocol for lack of a better word that a sampling
18 protocol perhaps is the best way to say that, so that we don't
19 have to do this all over again because there's no reason to
20 think that an independent vendor is going to take less time
21 doing this than Sullivan and Strickler has.

22 Indeed, given all of the bells and whistles that Mr.
23 Radine wants to add, it's likely to take more time. So
24 sampling is the way to go.

25 THE COURT: Uh-huh. I think we're agreed on that,

1 aren't we, Mr. Radine?

2 MR. RADINE: Well, again, I don't -- I mean, we're
3 happy to start with certain searches. The problem of sampling,
4 again, is just that I think the main expense is database
5 reconstruction more than it is running searches.

6 THE COURT: Right.

7 MR. RADINE: So, you know, one can see where one is
8 at after so many searches, but running searches generally is a
9 pretty quick process.

10 It's not really possible to reconstruct part of a
11 database. So it's like having part of a car assembled for it
12 to work, the whole thing has to be reconstructed.

13 No, Tape 6, that database is a more modern database.
14 Might be a easier reconstruction project for a vendor, but we
15 will see.

16 So, we would agree to then split costs on Tape 6. I
17 think that's a little productive. We might have a firmer line
18 on costs on Tape 23.

19 As Mr. Berger pointed out, they already produced
20 transactions from that core banking system that's backed up on
21 Tape 23. And yet, their search methodology has not produced a
22 single one of those transactions they've already produced. So
23 obviously things are not working there.

24 THE COURT: Uh-huh.

25 MR. RADINE: So, we'll take one step at a time and

1 start with Tape 6.

2 THE COURT: Okay.

3 MR. BERGER: Your Honor, just so the record is clear,
4 it's not limited -- when I say something is not working here,
5 these are ad hoc tapes. So to say that, oh, well you got six
6 ad hoc tapes and even though you're -- you've produced
7 documents from your entire core banking system that ad hoc
8 tapes that capture tiny slices of your entire core banking
9 system haven't produced the same transactions.

10 That's not only unsurprising. It's to be expected
11 because it's not a full backup. So he's setting up a strawman
12 and knocking it down.

13 And when he -- my only last point is if he's going to
14 come to us with a proposal, database reconstruction when you
15 hold it up to the mirror sounds like it reads expensive.

16 So I'd like to know what database reconstruction is
17 going to cost before the Court orders that BOP have to share
18 that cost.

19 THE COURT: That seems to make sense.

20 Any objection, Mr. Radine?

21 MR. RADINE: We'll keep working with Defendant and
22 working with the Court to pull this process along.

23 THE COURT: Okay, so we'll focus -- I mean, in my
24 mind, I'm thinking of focusing on 6 as being a sample of the
25 entire universe. I know that's not the way you were using the

1 term.

2 But it seems to me that focusing on 6, Tape 6 with
3 the (inaudible) shared and with shared vision as to what would
4 be done seems like the best approach right there. And then, we
5 could review the findings and take it from there.

6 How long will it take you all to meet and confer and
7 work out some kind of a protocol with respect to Tape 6?

8 MR. RADINE: Well, so this is Michael for Plaintiffs.
9 We're ready to talk to Defendant now. So we're aware of some
10 vendors in this space that we are happy to contact and check
11 their availability and share all those transparently with BOP.
12 Two to three weeks perhaps?

13 THE COURT: And how does the fact that it's probably
14 going to take Sullivan and Strickler another four weeks to
15 complete its work, how does that fit into the timing of what it
16 is that we're looking at now?

17 MR. RADINE: Well, this is Michael again. Just two
18 notes. One is this Sullivan and Strickler is working I believe
19 exclusively now on Tape 23, not Tape 6.

20 THE COURT: Okay.

21 MR. RADINE: We do have an outstanding question to
22 BOP that the answers of which would still affect our -- how
23 this process would go, which is not to say that we couldn't
24 proceed now with Tape 6, but we'd still want those questions
25 answered.

1 THE COURT: Uh-huh. So that would be part of your
2 meet and confer?

3 MR. RADINE: Sure.

4 THE COURT: Okay. So --

5 MR. BERGER: Your Honor, may I ask the Court one
6 question?

7 THE COURT: Sure.

8 MR. BERGER: Just in terms of understanding the
9 parameters you're laying out, that shared vision as to what
10 would be done, I just didn't want there to be any doubt about
11 that, that the premise is if this goes forward, Plaintiffs do
12 not have vision insight access to the underlying data unless it
13 is determined to be responsive the way it would be determined
14 to be responsive in any normal discovery process.

15 THE COURT: Yes, I think I heard Mr. Radine agree to
16 that.

17 MR. BERGER: Thank you, Your Honor.

18 MR. RADINE: Right, we don't want to see anything
19 confidential. We obviously want to be able to ask questions
20 about things like number of hits on a search term or the time
21 period that search terms are in, that sort of thing.

22 Without that, we're essentially outside of the
23 process. But in terms of the confidential customer information
24 in a particular transaction, then no, we think that would go to
25 BOP.

1 THE COURT: Okay.

2 MR. BERGER: So perhaps this is proposal, Your Honor.
3 As you rightly pointed out about the work being done on Tape 23
4 and the questions that Plaintiffs have, why don't they go and
5 get some ideas about how much what they have in mind would cost
6 for Tape 6?

7 We'll continue of course to answer the questions that
8 were remained open including yesterday's new request at the
9 meet and confer.

10 And then, we report to the Court. Let's assume this
11 allows Sullivan Strickler the four weeks it needs. We report
12 to the Court at a reasonable time right after the 1st of the
13 year where we are on all of these fronts.

14 THE COURT: That sounds good to me.

15 MR. RADINE: That sounds good to the Plaintiffs.

16 THE COURT: All right, so why don't we pick a date
17 for the status report that works for everyone?

18 Mr. Berger, do you want to, since you're closest to
19 Sullivan Strickler, do you want to pick the date?

20 MR. BERGER: That's a great honor, Your Honor, thank
21 you. Let us -- could we perhaps -- any date during the week of
22 the January 9th would be sensible. I believe that the 2nd is
23 an observed federal holiday. And I've heard rumors that people
24 actually go on vacation.

25 So any time during the week of -- shall we say a

1 status report due January 10th? And then, we can have a call
2 with Your Honor if necessary. You could schedule for later
3 that week, the 12th or the -- oh, I think we should all avoid
4 Friday the 13th.

5 So perhaps if the Court's available on January the
6 12th with a status report due on either the 9th or the 10th,
7 that would make sense to me.

8 THE COURT: Okay, well, I think that you're going to
9 come up with a mutually agreeable proposal here. So you
10 probably won't need my time, but let me see what I have that
11 week. So a status report on the 10th definitely.

12 MR. BERGER: Your Honor, if you think you don't need
13 to book time, we can certainly let the Court know in the status
14 report if we think we need to be heard and we'll certainly
15 going to try to work things out. So I don't mean to burden the
16 Court's calendar --

17 THE COURT: Okay.

18 MR. BERGER: -- if it's not necessary.

19 THE COURT: Well, I was just looking to see if there
20 was any time. I'll squeeze you in one way or another if I need
21 to. So hopefully, you won't need my help, but if you do, we'll
22 work it out.

23 MR. BERGER: Thank you, Your Honor.

24 THE COURT: So anything else from the Plaintiff?

25 MR. RADINE: No, Your Honor.

1 THE COURT: And how about Defendant?

2 MR. BERGER: No, Your Honor. Thank you.

3 THE COURT: Good, well, I'm glad to hear that you're
4 able to work together. I think that makes -- can make all of
5 your lives easier. And as Mr. Berger says, you might actually
6 be able to take a vacation (inaudible).

7 MR. BERGER: Thanks very much, Your Honor. We
8 appreciate the help.

9 THE COURT: You have a good holiday, all of you.

10 MR. BERGER: All right, thanks.

11 MR. RADINE: You, too, bye bye.

12 (Proceedings concluded at 2:47 p.m.)

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CERTIFICATE

I, Chris Hwang, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

21

December 9, 2022

Chris Hwang

Date

Court Reporter